No. 11-1507

In The Supreme Court of the United States

TOWNSHIP OF MOUNT HOLLY, et al.,

Petitioners,

v.

MT. HOLLY GARDENS CITIZENS IN ACTION, INC., et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF HOUSING SCHOLARS AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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QUESTION PRESENTED

Section 804(a) of the Fair Housing Act ("FHA") makes it unlawful "[t]o refuse to sell or rent . . . , or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin." 42 U.S.C. § 3604(a). This Court limited the grant of certiorari to the following question: Whether disparate-impact claims are cognizable under FHA § 804(a).

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INTEREST OF *AMICI CURIAE*

Amici curiae are historians, social scientists, demographers and housing scholars who study the history of housing segregation and its effects in the United States. *Amici*, listed in the Appendix, are college and university faculty and researchers who have published numerous books, articles, and reports on segregation. *Amici* file this brief to acquaint the Court with the history of governmental policies (federal, state, and local) that created racially segregated patterns in our metropolitan regions and to illustrate why disparate impact claims are necessary to ensure that contemporary housing policies avoid perpetuating these patterns in violation of the language and purpose of the Fair Housing Act (FHA).[1]

SUMMARY OF ARGUMENT

Redevelopment plans like Mt. Holly's increase African-American segregation, violating the FHA's requirement that the town "affirmatively further fair housing." Displaced African-American residents of redevelopment zones typically do not have alternative affordable housing options in nearby predominantly white neighborhoods, and instead must relocate to

[1] Petitioner and Respondents have consented to the filing of this brief in letters on file in the Clerk's office. No counsel for Petitioner or Respondents authored this brief in whole or in part, and no counsel or party made a monetary contribution specifically for the preparation or submission of this brief.

neighborhoods as racially isolated, if not more so, than the redevelopment zones themselves.

Displaced residents' limited housing choices are structured by a century-long nationwide public policy of purposeful segregation. This brief will examine the history and dynamics of public and private discrimination that created and fostered segregation in our metropolitan regions, patterns that help us understand Mt. Holly and which have not been disestablished.

Urban ghettos were promoted and often created by federal, state, and local public housing policy. The federal government's racially explicit mortgage guarantee policies intended to residentially segregate the races and created middle-class, predominantly white towns and suburbs, which surrounded central cities. These policies were encouraged and reinforced by private discrimination. Both public and private housing discrimination throughout the twentieth century violated African-Americans' rights. *See Hills v. Gautreaux*, 425 U.S. 284 (1976); *Jones v. Alfred H. Mayer, Co.*, 392 U.S. 409 (1968); *Shelley v. Kraemer,* 334 U.S. 1 (1948).

Prohibited from living in white suburbs when they were affordable, African-Americans did not benefit from substantial twentieth-century housing capital appreciation, as did white families, contributing to African-Americans' inability to move to integrated neighborhoods now, even if discrimination has diminished. African-Americans' incomes are also

depressed because of intertwined public and private dual labor market policies that prevented African-Americans from accumulating wealth and work experience necessary to afford housing in integrated neighborhoods.

As a result of mutually reinforcing but unlawful housing and labor market policies and practices, residents of racially isolated redevelopment zones typically cannot afford to move into integrated neighborhoods when their housing is condemned. Because housing remains structured by a legacy of public policy and private behavior, redevelopment plans like Mt. Holly's have a disparate impact on African-Americans. Unless they make adequate provision for relocating African-American families to integrated neighborhoods, these plans increase their segregation by forcing displaced residents to seek housing in other predominantly low-income, non-white communities, violating the FHA's language and purpose.

The FHA intended to ameliorate and remediate segregation's harms and effects. As this Court recognized in *Trafficante*, the FHA's main purpose is to "replace ghettos 'by truly integrated and balanced living patterns.'" *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205 (1972). Consequently, the FHA not only prohibited discrimination, but also charged the Department of Housing and Urban Development (HUD) with "affirmatively furthering fair housing." This Court should therefore affirm the Third Circuit's decision.

ARGUMENT

I. FEDERAL, STATE, AND LOCAL GOVERNMENTS CREATED AND FOSTERED METROPOLITAN SEGREGATION

A. Federal Policy Promoting Residential Segregation

1. Federal public housing programs helped create segregated African-American ghettos

New Deal public housing policy placed projects according to residents' race. Harold Ickes, President Franklin Roosevelt's first housing administrator, established a "neighborhood composition rule": public housing could not alter a neighborhood's previous racial pattern. Thus, projects for black occupancy were constructed in existing black areas, usually already considered "slums." *See, e.g.,* Arnold Hirsch, Choosing Segregation. Federal Housing, *in From Tenements to the Taylor Homes* (John Bauman, Roger Biles, and Kristin Szylvian, eds., 2000). In Chicago, e.g., by 1947 there were eight segregated projects (four each for blacks and whites) in addition to two integrated projects (in previously mixed neighborhoods). *See* Robert Weaver, *The Negro Ghetto* (1948).

Projects for whites developed many vacancies as national housing shortages eased and whites moved to suburbs. Projects for blacks had long waiting lists. Pressed to create more African-American units in 1944, the National Housing Agency refused, stating

that open sites were unavailable in traditionally black neighborhoods. *Id*.

These conditions were exacerbated by federal requirements that a slum unit be demolished for every public housing unit constructed. Displaced black families then crowded into neighboring African-American ghettos, overflowing into adjoining white neighborhoods that soon became predominantly African-American as well. This precipitated white flight to suburbs from now-overcrowded neighborhoods. *See* Kenneth Jackson, *Crabgrass Frontier* (1987).

Segregation was also public housing policy throughout New Jersey. Atlantic City maintained a strict segregation policy during World War II, with entire projects designated either for whites or blacks. In Newark, three projects were all-white, and in three others, blacks were assigned to separate sections. Jersey City's housing authority constructed a whites-only project, ignoring that blacks had also lived in the neighborhood prior to its demolition for the project. When the federal government objected, Jersey City admitted a single black family to the new project. *See* Weaver, *supra*.

This public housing segregation pattern was reinforced by federal housing for World War II production plant workers and military personnel. William Levitt and Sons built the largest federal projects in Norfolk, Portsmouth, and Pearl Harbor, all segregated. *Id.* This policy frequently established neighborhood segregation in cities where black workers had not previously lived in large numbers. *Id.*

In 1941, the government constructed the Willow Run bomber plant in a previously undeveloped Detroit suburb without pre-existing racial housing patterns. The government then built housing for the war workers, adopting a policy that only white workers could reside there. Thus, the workforce necessarily was overwhelmingly white in contrast to Detroit plants to which black workers had access. By 1945, as whites left public housing for single-family homes in the developing suburbs, the authority accepted a small number of African-American families in Willow Run housing, after setting aside a segregated section for them. *Id.*

In several cities, federal World War II policy established segregated housing where no, or very little, segregation had previously existed. In San Diego, the Navy itself managed housing, but excluded African-Americans. The Federal Public Housing Authority also constructed war workers' housing with separate black and white sections. It enforced segregation rigidly. African-Americans were not admitted when the black section was filled, although many vacancies existed in the designated white sections. *Id.*

A Douglas Aircraft plant employing 44,000 workers, including many African-Americans, was located in Santa Monica. But when the government proposed to subsidize a housing project adjoining the plant, community protests over the prospect of black neighbors caused removal of the project to Watts, an integrated neighborhood with an existing black population. Federal policy then turned Watts into a

black ghetto where African-Americans were circumscribed, into the present. By 1965, six public housing projects had been built in or immediately adjacent to Watts. *See* Loren Miller, Testimony, in *Transcripts, Depositions, Consultants Reports, and Selected Documents of the Governor's Commission on the Los Angeles Riots*, Volume 10.

Public housing segregation continued post-war. In 1945, Detroit Mayor Edward Jeffries' successful reelection campaign warned white voters that housing projects with black residents would be located in their neighborhoods if his opponent were elected. His campaign literature proclaimed, "Mayor Jeffries is Against Mixed Housing." One Jeffries campaign leaflet promising integration if his opponent were elected was purportedly addressed to blacks but actually distributed only in white neighborhoods to arouse racial fears. In 1948-49, the Detroit city council held hearings on 12 proposed projects in predominantly white areas. Jeffries' successor (who also campaigned against "Negro invasions") vetoed all 12 but approved projects in predominantly black areas. *See* Thomas J. Sugrue, *The Origins of the Urban Crisis: Race and Inequality in Post-war Detroit* 80 (2005).

In 1949, Congress considered new public housing legislation. Opponents proposed "poison pill" amendments prohibiting racial discrimination, knowing that if they were adopted, southern Democrats who otherwise supported public housing would kill the legislation. Congress then rejected the amendments, so the 1949 Housing Act permitted localities to continue

designing separate black and white public housing, or to segregate projects internally. *See* Richard O. Davies, *Housing Reform During the Truman Administration* 108 (1966).

Dearborn, Michigan, a Detroit suburb, maintained whites-only projects by accepting only tenants who had lived in Dearborn for the previous five years before being eligible for public housing. As no African-Americans (except a few domestic servants) lived in Dearborn, the policy guaranteed black ineligibility. In a 1956 interview, Dearborn's mayor described his delight regarding whites moving to Dearborn to flee integrated Detroit neighborhoods: "These people are so anti-colored, much more than [Southerners]. . . . Negroes can't get in here. Every time we hear of a Negro moving in, we respond quicker than you do to a fire." One black family that purchased a home in defiance of city policy found its gas turned off and garbage uncollected, and finally fled. *See* Davis McEntire, *Residence and Race* 289 (1960). By the 2010 census, Dearborn's black population was still only 4%, with whites 89% (including many Arab-Americans). On Dearborn's border, in contrast, Detroit was 83% black, 11% white. *2010 Census*, Census.gov.

In 1971, construction of publicly funded townhouses began in an all-white Philadelphia neighborhood. A white homeowners' association blocked construction workers and equipment. Police refused

to intervene or to enforce an injunction against the demonstrators. African-Americans awaiting public housing filed suit. Mayor Frank Rizzo rejected compromises because "people in the area felt that black people would be moving into the area if public housing were built"; he referred to public housing as "black housing" and vowed not to permit it in "white neighborhoods." *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126 (3d Cir. 1977).

Meanwhile, the federal government rejected proposals to pressure Philadelphia by withholding other funds. In 1977, a federal appeals court ordered the city to permit construction. The project was completed in 1982, nearly a quarter-century after demolition of black residents' homes and their relocation to more segregated neighborhoods. *See* David Bartelt, *Housing the Underclass*, in *The Underclass Debate* (Michael B. Katz ed., 1993); *Resident Advisory Bd.*, 564 F.2d 126.

In 1976, this Court found the Chicago Housing Authority, with federal complicity, had unconstitutionally selected sites to create segregation. *Gautreaux*, 425 U.S. 284. With site selection subject to veto by aldermen of wards in which projects were proposed, 99½% of sites in white neighborhoods were vetoed, compared to 10% of sites in black neighborhoods. Mayor Richard J. Daley rejected all sites in predominantly white neighborhoods, saying that public housing should only go "where this kind of housing is most needed and accepted." *See* Alexander Polikoff, *Waiting for Gautreaux* (2007). The Court ordered

that future sites be found in predominantly white suburbs. The federal-city response was to cease building public housing altogether.

Rather than follow a path consistent with the Fair Housing Act's mandate, government policy exacerbated segregation. President Nixon told a 1970 news conference, "I believe that forced integration of the suburbs is not in the national interest" and followed with a formal statement that "a municipality that does not want federally assisted housing should not have it imposed from Washington." *See* The American Presidency Project, *Richard Nixon: "The President's News Conference,"* December 10, 1970; *Richard Nixon: "Statement About Federal Policies Relative to Equal Housing Opportunity,"* June 11, 1971.

Other federal court decisions, for example in Yonkers, Dallas, Baltimore, East Texas, and elsewhere, have found that the government created or perpetuated ghettos by discriminatory decisions to locate public housing for African-Americans only in ghetto communities, or by assignment policies placing black tenants in all black projects and white tenants in all white projects. *See United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181 (2d Cir. 1987); *Walker v. U.S. Dep't of Hous. & Urban Dev.*, 912 F.2d 819 (5th Cir. 1990); *Thompson v. U.S. Dep't of Hous. & Urban Dev.*, 348 F. Supp. 2d 398 (D. Md. 2005); *Young v. Pierce*, 822 F.2d 1368 (5th Cir. 1987). In Miami, where black

tenants were assigned to segregated projects while whites received housing vouchers for use in predominantly white communities, it was not until 1998 that a legal settlement required vouchers as well for African-Americans. *See* Raymond A. Mohl, *Whitening Miami*, 79 Fla. Hist. Q. 319, 345 (2001).

In none of these or other cases were remedies sufficient to undo segregation that federal policy created. By the time of these dispositions, vacant land in predominantly white neighborhoods where public housing could previously have been built was no longer available.

In 1984, investigative reporters from the *Dallas Morning News* visited federally funded projects in 47 cities nationwide and found the nation's nearly 10 million public housing residents almost always segregated by race. *See* Craig Flournoy & George Rodrigue, *Separate and Unequal*, Dall. Morning News, Feb. 10, 1985.

As the historian Kenneth Jackson concluded,

> "The result, if not the intent, of the public housing program of the United States was to segregate the races, to concentrate the disadvantaged in inner cities, and to reinforce the image of suburbia as a place of refuge [from] the problems of race, crime, and poverty."

Jackson, *supra*, at 219. In fact, it was the intent as well. "By every measure," Jackson added, "the

Housing Act of 1937 was an important stimulus" to white flight from the cities. *Id.*

2. Federal mortgage guarantee programs helped create segregated white suburbs.

While federal public housing programs pushed African-Americans into more concentrated urban areas, federal private housing programs pulled whites into racially exclusive suburbs. The creation and expansion of suburbs in metropolitan areas depended on federal support, including transportation policy (highways enabling suburbanites to commute) and tax policy (tax benefits for mortgage interest, making single family home ownership affordable). In the process, explicitly segregationist policies were inscribed into these formative and federally subsidized growth patterns.

The Federal Housing Administration supported suburbanization by insuring advance bank financing for developers to construct large multi-home tracts, and by insuring mortgage loans to homebuyers, reducing bank risk, thus lowering mortgage interest rates. These federal policies made it substantially cheaper for qualified borrowers to buy suburban homes. *See, e.g.,* Jackson, *supra*, at 204-206. For the first time Americans became more likely to purchase homes than rent. However, these policies carried

racially exclusionary requirements. *See* Ira Katznelson, *When Affirmative Action Was White* (2005); Douglas S. Massey and Nancy A. Denton, *American Apartheid* (1993).

Beginning in 1935, the government instructed bank appraisers to give higher ratings where "[p]rotection against some adverse influences is obtained by the existence and enforcement of proper zoning regulations and appropriate deed restrictions," adding that "[i]mportant among adverse influences . . . are infiltration of inharmonious racial or nationality groups." The government provided a model restrictive covenant for builders and developers to use. *See* Federal Housing Administration, *Underwriting Manual: Underwriting and Valuation Procedure Under Title II of the National Housing Act*, Sections 309-312, June 1, 1935; Miller, *supra*, at 6.

Until 1948, more than half of all new subdivisions built in the United States had racially restrictive covenants. Kevin Fox Gotham, *Urban Space, Restrictive Covenants, and the Origins of Racial Residential Segregation in a U.S. City, 1900-50,* 42.3 Int'l J. of Urban and Regional Res. 616 (2000). A survey of 300 suburban subdivisions developed from 1935 to 1947 in or around New York City found that 85 percent of all subdivisions with 75 or more units (almost all had advance government guarantees) had restrictive covenants. *See* John P. Dean, *Only Caucasian*, 23 J. of Land & Pub. Util. Econ. 428, Table II (1947).

The Veterans Administration (VA) also insured mortgages and adopted racial policies. Neither agency

suspended builders who violated state anti-discrimination laws. In 1961, the VA claimed that no veterans housing could be built if the agency insisted on non-discrimination, and therefore prohibiting discrimination against blacks would be tantamount to discriminating against white veterans. *See* United States Commission on Civil Rights, *Book 4, Housing,* U.S. Government Printing Office (1961), 69-71 [*hereinafter* USCCR *Book 4*].

Levittown, a 1947 Nassau development of 17,500 homes, addressed the housing shortage for white veterans, but at the Federal Housing Administration's insistence, developer William Levitt refused sales to blacks and each contract included a provision prohibiting future such re-sales. Blacks were banned from Levittown rentals as well. When a renter violated the policy by sub-letting to a black family, the renter and sublessee were evicted.

Plans for subdivisions like Levitt's were submitted for Federal Housing Administration or VA pre-approval, the agencies determined the appraised values on which loans were made, and banks advanced construction capital based on the government guarantees. Deeds cited this policy, with preambles such as: "Whereas the Federal Housing Administration requires that the existing mortgages on the said premises be subject and subordinated to the said [racial] restrictions. . . ." Dean, *supra*, at 430.

By 1950, these federal agencies insured half of all new mortgages nationwide, usually requiring racial

restrictions. White families, who prior to the postwar housing boom lived in urban neighborhoods in proximity to or among African-Americans, were relocated by Federal Housing Administration policy to more isolated white enclaves. In a 1961 report, the U.S. Commission on Civil Rights called its "central finding" that "at all levels of the housing and home finance industries. . . . Federal resources are utilized to accentuate [the] denial of equal housing opportunity on racial grounds." USCCR *Book 4*. In 1973, the Commission concluded that the Federal Housing Administration "was responsible for the widespread use of racial covenants," and that the "housing industry, aided and abetted by Government, must bear the primary responsibility for the legacy of segregated housing . . . Government and private industry came together to create a system of residential segregation." USCCR, *Understanding Fair Housing*, Clearinghouse Publication 42 (1973); *see also* Hirsch (2000), *supra*.

State courts typically enforced restrictive covenants by issuing injunctions to prevent black purchasers from moving into white neighborhoods, or by ordering eviction of black homeowners and cancellation of sales. In 1948, this Court ruled that restrictive covenants could not be enforced by state courts, because such enforcement would constitute state action. *Shelley*, 334 U.S. 1. But the Court's decision did not preclude property owners from voluntarily agreeing to racial covenants, or county clerks (also state actors) from continuing to accept covenants, some covering entire communities into the late 1990s.

See Garrett Power, *Meade v. Dennistone*, 63 Md. L. Rev. 773 (2004); James W. Loewen, *Sundown Towns* (2005).

Although the Federal Housing Administration removed explicitly racist language from its manuals in the 1950s, private firms, associations and banks continued to use such language through the 1970s. The Federal Housing Administration set national standards of valuation and appraisal used throughout the housing market, which reinforced and institutionalized housing segregation on a national scale. In this way, the ranking system created by the government persisted long after its disuse by government actors. Underwriting and pricing of home insurance policies adversely affected minority households and communities and reinforced patterns of segregation. *See* Gregory Squires, *Racial Profiling, Insurance Style*, 25 J. Urb. Aff. 391 (2003).

Not until a year and a half after *Shelley* did the Solicitor General advise the Federal Housing Administration it could no longer insure mortgages with restrictive covenants. However, he applied this policy only to future deeds, executed two and a half months after his announcement, and nearly two years after the Court's ruling. The delay permitted property owners to hurriedly record restrictions where they had not previously existed.

The government also continued to insure properties with new covenants designed to evade *Shelley*'s intent by requiring sale approvals by neighbors or community boards. Until 1962 when President

Kennedy issued an order prohibiting federal funds from supporting housing discrimination, the Federal Housing Administration continued to finance subdivision developments in which the builders refused, as open policy well-known to agency officials, to sell to black homebuyers, or in which developers listed homes with brokers who refused sales to African-Americans. *See* Davies, *supra*; Miller, *supra*.

Subsequent to *Shelley*, Levitt continued to restrict both sales and rentals to whites in its government-insured Nassau County, Bucks County, Pennsylvania, Willingboro, New Jersey, and Bowie, Maryland projects. In 1950 Levitt evicted a white family from its Nassau project for inviting their children's black playmates from a neighboring community into its home. The Nassau County Supreme Court upheld the eviction. *See* Bruce Lambert, *At 50, Levittown Contends with Its Legacy of Bias*, N.Y. Times, Dec. 28, 1997; David Kushner, *Levittown* 65 (2009). Suggesting the enduring effects of federal racial policy, by 2010 Levittown was still less than 1% black, compared to 79% black in the nearby town of Roosevelt and 11% in Nassau County as a whole.

Similar large suburban projects and thousands of smaller ones were constructed with federally directed racial restrictions nationwide. The extraordinary growth of California in the decades following World War II was financed on a racially restricted basis by the federal government. Among the better known large developments are Daly City, south of San Francisco; Lakewood, south of Los Angeles; and Panorama City, north of it. Each was financed with

Federal Housing Administration guarantees and to comply with its policy, did not sell to African-Americans. By 1968, when the FHA was adopted, black ghetto/white suburb segregation was firmly established. Jurisdictions locked-in these patterns with exclusionary zoning rules and other practices.

3. Federal and state regulation of financial institutions kept African-Americans out of white suburbs and contributed to deterioration of segregated African-American neighborhoods

While federal policy ensured that few African-Americans could live in predominantly white suburbs, it also ensured that segregated urban communities would deteriorate. Banks and thrift institutions discriminated against African-American mortgage borrowers, independent of Federal Housing Administration pressure. Even for non-insured loans, 20th century financial institutions practiced "redlining," a refusal to issue mortgages, on terms comparable to those whites enjoyed, to African-Americans in their own, segregated neighborhoods. Congress adopted the Community Reinvestment Act (12 U.S.C. § 2901) in 1977 in an attempt to prohibit this practice.

Redlining was not simply private banking activity. Banks and thrifts were heavily regulated since the 1930s. Government deposit insurance programs underwrite bank and thrift institution profits; in return, there is extensive regulation of lending practices.

Federally- and state-chartered banks and thrifts regularly host examiners from the Federal Reserve, Comptroller of the Currency, Federal Deposit Insurance Corporation (FDIC), and Office of Thrift Supervision, who ensure sound loan practices. Banks and thrifts could engage in racial discrimination only if regulators chose to permit it. Until recently, regulators ignored discrimination.

In 1961, the United States Commission on Civil Rights questioned regulators about bank redlining. Ray M. Gidney, then-Comptroller of the Currency, responded, "Our office does not maintain any policy regarding racial discrimination in the making of real estate loans by national banks." FDIC chairman Earl Cocke responded that banks he supervised should deny loans to African-Americans because whites' property values might fall if blacks moved nearby. Federal Reserve chairman William McChesney Martin responded that "Neither the Federal Reserve nor any other bank supervisory agency has – or should have – authority to compel officers and directors of any bank to make any loan against their judgment." If black applicants are denied loans because of race, Martin asserted "the forces of competition" would ensure that other banks will make the loans. *See* USCCR *Book 4,* at 42-51. With regulatory authority over all banks in the Federal Reserve system, and with virtually all banks engaging in discrimination, Martin's claim contradicted available evidence.

In the mid-twentieth century, because conventional financing was not available to them, African-Americans resorted to high-interest installment (contract) purchases where single missed payments could lead to eviction, and no equity accumulated until purchases were fully paid. Such contracts were widespread nationwide, in Chicago, Baltimore, Cincinnati, Detroit, Washington, D.C., and elsewhere. *See* James Alan McPherson, *The Story of the Contract Buyers League*, Atlantic Monthly, April 1972.

As historian Beryl Satter recounts,

> Because black contract buyers knew how easily they could lose their homes, they struggled to make their inflated monthly payments. Husbands and wives both worked double shifts. They neglected basic maintenance. They subdivided their apartments, crammed in extra tenants and, when possible, charged their tenants hefty rents. . . .
>
> White people observed that their new black neighbors overcrowded and neglected their properties. Overcrowded neighborhoods meant overcrowded schools; in Chicago, officials responded by "double-shifting" the students (half attending in the morning, half in the afternoon). Children were deprived of a full day of schooling and left to fend for themselves in the after-school hours. These conditions helped fuel the rise of gangs, which in turn terrorized shop owners and residents alike.

> In the end, whites fled these neighborhoods, . . . [understanding] that the longer they stayed, the less their property would be worth. But black contract buyers did not have the option of leaving . . . – if they did, they would lose everything they'd invested in that property to date. Whites could leave – blacks had to stay.

Beryl Satter, *Race and Real Estate*, 18 Poverty and Race (July/August 2009).

When banks failed to issue mortgages to African-Americans in predominantly black communities, or the Federal Housing Administration declined to insure them, the government contributed to ghetto deterioration. With financing difficult to obtain, homes for sale stayed vacant longer periods in black than in white communities and were more likely to be vandalized or in visible disrepair. The poor maintenance contributed to white suburbanites' fears that if they dropped resistance to African-American neighbors, their communities would also deteriorate. High contract-purchase costs meant lower relative African-American incomes and wealth accumulation. Along with lack of equity, the result was growing unaffordability of suburban moves for African-Americans, even after overtly discriminatory barriers diminished.

In recent years, redlining gave way to reverse redlining, as historically credit-deprived neighborhoods were targeted for predatory loans to satisfy the secondary mortgage market's voracious demand for securitized loan products. Because low-income,

minority areas were historically excluded from the traditional lending markets, lenders were able to saturate these neighborhoods with subprime loan solicitations; the loans, including those to borrowers with credit eligibility for conventional loans, were five times as likely in African-American than in white neighborhoods. Lenders even steered African-American borrowers with prime credit to take out subprime loans. The mortgages, with deceptive teaser rates, above-market longer-term rates, impractical balloon payments, and exorbitant closing costs and prepayment penalties, led to foreclosure waves in lower-middle class African-American neighborhoods in cities and first-ring suburbs, forcing many first-time homeowners back into rental housing in lower-income ghettos, increasing racial segregation. Large institutions negotiated settlements of suits that alleged civil rights violations, although the institutions did not admit liability. *See* Richard Rothstein, *A Comment on Bank of America/Countrywide's Discriminatory Mortgage Lending and Its Implications for Racial Segregation*, Economic Policy Institute (2009).

In one case, the city of Cleveland sued subprime lenders for targeting low-income minority neighborhoods, notwithstanding that lenders knew or should have known that housing prices in these neighborhoods would not appreciate sufficiently to make the loans payable. In dismissing the suit, a federal district court concluded that because mortgage lending is so heavily regulated by federal and state government, "there is no question that the subprime lending

that occurred in Cleveland was conduct which 'the law sanctions.'" *City of Cleveland v. Ameriquest Mortg. Sec., Inc.*, 621 F. Supp. 2d 513 (N.D. Ohio 2009).

4. Other federal policies contributed to segregating metropolitan areas

Public housing for black ghettos, mortgage insurance for white suburbs, and credit denial to African-American borrowers or prospective homeowners were the principal instruments of federal segregation policy. But there were others, including tax exemptions, highway construction and urban renewal policy.

Where developers did not include restrictions in initial deeds, covenants were mutual agreements made subsequently by neighboring homeowners. Neighborhood associations organizing racial covenants were non-profit organizations or were sponsored by non-profit religious institutions, hospitals, or universities. For example, the University of Chicago spent about $100,000 from 1933 to 1947 on legal services to defend restrictive covenants in its neighborhood. *See* Arnold Hirsch, *Making the Second Ghetto* (1983). *Shelley v. Kraemer*, 334 U.S. 1, the 1948 decision of this Court that held racial covenants were unenforceable at law, stemmed from a St. Louis restrictive covenant organized by a neighborhood association sponsored by a church whose trustees provided funds from the church treasury to finance the lawsuit

to enforce the covenant. Such church involvement and leadership in racially-purposed property owners' associations was commonplace throughout the nation.

The government subsidized non-profit associations, hospitals, religious institutions, and universities by granting tax exemptions and making contributions to them tax-deductible. The Internal Revenue Service maintained the tax-exempt status of organizations that discriminated. As the Court concluded in 1983, "an examination of the [Internal Revenue Code's] framework and the background of congressional purposes reveals unmistakable evidence that, underlying all relevant parts of the IRC, is the intent that entitlement to tax exemption depends on meeting certain common law standards of charity – namely, that an institution seeking tax-exempt status must serve a public purpose and not be contrary to established public policy." *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983). Tax subsidies that promoted racially restrictive covenants reinforced the government's shared responsibility for residential segregation. *See* William T. Coleman, Jr., *Brief of Amicus Curiae* in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1982) (citing *Norwood v. Harrison*, 413 U.S. 455 (1973)).

The interstate highway system exacerbated segregation. Clearance for highways displaced large and disproportionate numbers of black families because when interstate highways were constructed to bring suburbanites downtown, they were also often used as "slum clearance" to displace low-income

neighborhoods deemed too close to downtown businesses. Frequently these neighborhoods, although with many black residents, were integrated. Local officials foresaw that displaced black families would have to relocate by crowding into outlying black neighborhoods, increasing metropolitan segregation. Planners selected some routes to create barriers between white and black neighborhoods to halt the spread of black residence. Weaver, *supra*.

The executive director of the American Association of State Highway Officials, influential in Congressional highway design, later acknowledged that "some city officials expressed the view in the mid-1950's that the urban Interstates would give them a good opportunity to get rid of the local 'niggertown.'" The Senate deleted a provision for relocation assistance in the 1956 highway bill. *See* Gary T. Schwartz, *Urban Freeways and the Interstate System*, 49 So. Cal. L. Rev. 406, 485 n. 481, 483 (1975-76).

In Chicago, the Dan Ryan Expressway was routed to create a barrier between overwhelmingly black housing projects and white neighborhoods. In Atlanta, routes were chosen to create obstacles for black migration into white areas. *See* Raymond A. Mohl, *The Interstates and the Cities*, Poverty and Race Research and Action Council (2002); Yale Rabin, *The Roots of Segregation in the Eighties, in Divided Neighborhoods* (Gary A. Tobin ed., 1987).

Interstate highways through Atlanta, Charlotte, Pittsburgh, Pasadena, Cleveland, Columbus, Milwaukee, Detroit, St. Paul, New Orleans, Columbia, Birmingham, and Montgomery, among others, rejected available alternative routes that would have resulted in minimal housing loss, and instead routed highways through black communities. Alabama's highway director openly stated that his aim in Montgomery was to eliminate the church of Martin Luther King, Jr's deputy, Rev. Ralph Abernathy. After Abernathy complained to President Kennedy, the federal highway administrator advised the Alabama official to "let the dust settle for about six months and then proceed with construction of the project." Mohl (2002), *supra*, at 32-34.

Eventually, Congress required relocation housing to be provided for highways constructed after 1965, but by that time, the interstate highway network through downtown areas was mostly complete. Federally funded redevelopment plans (urban renewal) functioned similarly. Typically, low-income downtown neighborhoods were condemned for university or hospital expansion, or for middle-class housing to bring professionals back to cities.

Although the 1949 Housing Act provided federal financial assistance for relocation housing, it also permitted suburbs to veto construction of such housing within their borders; most predominantly white suburbs did so. Relocation housing, mostly high-rise public towers, was constructed almost exclusively in other all-black low-income ghettos, because once old

neighborhoods were redeveloped from urban renewal, former residents could no longer afford to live in them. *See* USCCR *Book 4*, at 96-102.

In Camden, New Jersey, some 3,000 low-income housing units were destroyed by interstate highway construction from 1963 to 1967, with replacement of only 100 units. The New Jersey State Attorney General's office concluded in 1968:

> It is obvious from a glance at the renewal and transit plans that an attempt is being made to eliminate the Negro and Puerto Rican ghetto areas by two different methods. The first is building highways that benefit white suburbanites, facilitating their movement from the suburbs to work and back; the second is by means of urban renewal projects which produce middle and upper income housing and civic centers without providing adequate, decent, safe, and sanitary housing, as the law provides, at prices which the relocatee can afford.

Quoted in Mohl (2002), *supra*, at 34-35.

B. State and Local Policy Promoting Residential Segregation

State and local governments systematically promoted residential segregation through their failure to regulate the real estate industry's discriminatory practices, tolerance of violence to prevent

integration of white neighborhoods, and the discriminatory provision of services to African-American ghettos.

1. Real estate and insurance industry supervision

Real estate brokers are licensed by every state. All states require written examinations and most also require classroom instruction prior to licensure. New Jersey is the only state not to require continuing education as a condition for regular license renewal. State authorities revoke licenses for violations of regulations. When states license brokers whose open practices create or maintain segregation, states effectively sanction these practices.

The most egregious form of licensed real estate activity that advanced racial segregation was blockbusting. This practice involved purposefully selling to African-Americans in predominantly white neighborhoods bordering ghettos. Licensed brokers and agents then publicized these sales widely to panic white neighbors that they would suffer severe property value losses if they did not sell their homes quickly. *See* McPherson, *supra*.

Speculators (often licensed agents themselves) then purchased these properties at below-market prices, quickly re-selling them at inflated prices to African-Americans desperate to flee overcrowded ghettos. The neighborhoods soon turned all black, and blockbusters then employed similar tactics in the

next adjoining predominantly white neighborhood. The practice ensured that border areas surrounding black ghettos could not remain. As of 1961, Baltimore was the only city nationwide with an ordinance prohibiting blockbusting. *See* Amanda Irene Seligman, *White Homeowners and Blockbusters in Postwar Chicago*, 94 J. Ill. St. Hist. Soc'y 70 (2001). Had state regulators withdrawn licenses from brokers who participated, urban integration might have been possible.

Throughout the twentieth century, state licensing practices included few or no efforts to discourage racially discriminatory activity by licensed brokers. In New York State, for example, real estate licensing law provides for revocation of licenses for "misstatement in the application for such license, fraudulent practices, dishonest or misleading advertising, or untrustworthiness or incompetency." There is no mention of racial discrimination. In contrast, where realtors engage in blockbusting, the law provides no penalties but only for the issue of an order prohibiting the practice. *See* N.Y. Real Prop. Law §§ 441-c, 442-h (McKinney 2011).

From 1924, the National Association of Realtors' Code of Ethics stated: "[A] realtor should never be instrumental in introducing into a neighborhood . . . members of any race or nationality . . . whose presence will clearly be detrimental to property values in that neighborhood." Realtors violating this were expelled from the association, with resulting loss of business. In 1939, the Association published a

training text for local real estate boards describing persons to whom homes in white neighborhoods should not be sold, such as "a colored man of means who was giving his children a college education and thought they were entitled to live among whites." Local codes were similar. The Washington (D.C.) Board's code stated, for example, that "[n]o property in a white section should ever be sold, rented, advertised, or offered to colored people." Weaver, *supra*.

As African-Americans increased in number in Northern areas, licensed brokers who led real estate boards identified neighborhoods where black occupancy was to be permitted. In developing its plan, the New York City Realtors Association wrote to the Birmingham (Alabama) Board, soliciting advice about how to "prevent negro encroachment on white residential territory." The St. Louis Real Estate Board conducted a referendum of members to identify black and white boundaries. *See* McEntire, *supra*, at 244-245; Weaver, *supra*, at 144, 216-17; Thomas J. Sugrue, *The Structures of Urban Poverty*, *in The Underclass Debate* 112 (Michael B. Katz ed., 1993); James A. Kushner, *Apartheid in America*, 22 Howard L. J. 547, 599, n. 118 (1979).

The 1968 Fair Housing Act made such rules unlawful, yet enforcement has been weak, mainly falling to non-governmental organizations to identify discrimination, usually by sending testers – matched black and white teams, posing as potential buyers, to real estate offices. Testers continue to identify discriminatory tactics: steering white buyers to

predominantly white communities and blacks to predominantly black communities; failing to show properties to blacks that whites are shown; making disparaging comments to prospective buyers considering purchases in predominantly other-race communities; failing to follow up with prospective black purchasers, and perpetuating other practices that segregate. *See* Margery Austin Turner, et al., *Housing Discrimination Against Racial and Ethnic Minorities 2012*, U.S. Dept. of Housing and Urban Development (2013).

The insurance industry is one of the most heavily regulated by state government and it, too, practiced redlining, denying insurance to African-American communities at terms similar to those offered white communities. Since 1995, fair housing organizations have filed lawsuits and administrative complaints resulting in favorable settlements with the largest insurers in the U.S. including State Farm, Allstate, Nationwide, American Family, Liberty Mutual, and others. In each case the insurers have agreed to increase the provision of their products in urban communities, in some cases targeting racial minorities in particular. *See* Squires, *supra*.

2. State-tolerated violence to prevent integration

Although African-Americans attempting to move into predominantly white neighborhoods were frequently met with mob violence, perpetrators were

rarely prosecuted and sometimes encouraged by state political and law enforcement authorities. Cross-burnings on lawns of or adjacent to African-American pioneers were commonplace and rarely attracted attention or interest of police.

Such was the experience, for example, of Mallie Robinson when she moved with her children, including Jackie – later the baseball pioneer – to predominantly white Pasadena in 1922. What did attract police attention, however, was when Jackie or his siblings ventured off Robinson property and into the neighborhood. The police responded daily to prevent it. *See* Arnold Rampersad, *Jackie Robinson* 23 (1997).

Following World War II, racial violence against black movers to white neighborhoods became commonplace. In Chicago by 1950 there were 350 incidents of such violence, fire-bombs, for example; in the first 10 months of 1947 alone, there were 26 such arson attacks, without a single arrest. Detroit had over 200 acts of intimidation and violence to deter African-American movers during this period. Similar violence took place in Atlanta, Birmingham, Cincinnati, Cleveland, Dallas, East St. Louis, Indianapolis, Kansas City, Los Angeles, Louisville, Philadelphia, Miami, Tampa, and elsewhere. *See especially* Leonard S. Rubinowitz and Imani Perry, *Crimes Without Punishment*, 92 J. Crim. L. & Criminology (1973).

Typically, when black families moved into white neighborhoods and faced mob violence, police did not intervene, sometimes telling movers that police

resources were insufficient to prevent violence and that leaving would be the best course, sometimes actively encouraging rioters. In 1964, African-American college students rented an apartment in a white Chicago neighborhood. A mob pelted the apartment with rocks. Police removed the students' belongings and told them they had been evicted. *See id.* at 351-352, 389, 390, n. 356.

Many violent protests were formally organized by neighborhood associations. Leaders were easily identified but not prosecuted. A U.S. Senate committee concluded that "[a]cts of racial terrorism have sometimes gone unpunished and have too often deterred the free exercise of constitutional and statutory rights." *See* Jeanine Bell, *The Fair Housing Act and Extralegal Terror*, 41 Ind. L. Rev. 537, 540 (2008). The share of prosecuted incidents is now high, suggesting how tolerant law enforcement agencies were previously.

Police forces also enforced residential segregation by frequently-documented incidents of selective harassment of African-American motorists or pedestrians venturing into predominantly white neighborhoods. In Plainfield, New Jersey, one of many where black ghetto youth rioted in 1967, an ongoing grievance was that police frequently stopped them without cause when they crossed the ghetto boundary. Peter Dreier, *Riot and Reunion: Forty Years Later*, The Nation, July 30, 2007.

Moving-in violence intimidated African-Americans from attempting to integrate neighborhoods. Survey data that black respondents prefer predominantly black neighborhoods more likely result from this historically pervasive intimidation than from self-segregation preferences. *See* Joe Feagin and Melvin Sikes, *Living with Racism* (1994).

3. Discriminatory provision of municipal services

Overcrowding and poor maintenance in ghettos, a direct result of federal housing policy, created an image for whites of African-Americans having slum characteristics, reinforcing resistance to integration. Contributing to these visible slum conditions was municipal policy denying adequate public services to African-American neighborhoods.

The 1968 National Advisory Commission on Civil Disorders found that disparate and inadequate municipal services such as sanitation, garbage removal, paving and street lighting were grievances by ghetto residents in about half of cities surveyed where riots recently occurred. The Commission observed that inadequate sanitation and garbage removal led white residents of nearby neighborhoods to fear their own homes would soon lose value, and that they should flee. *See* National Advisory Commission on Civil Disorders, *Report of the National Advisory Commission on Civil Disorders* 14, 145, 273 (1968).

A frequent distinction between Northern black and white neighborhoods was the absence of adequate park and recreational facilities for African-Americans. Robert Moses, New York State's and City's mid-twentieth century organizer of public services, refused to build parks in many black neighborhoods, asserting that blacks were dirty and would not keep parks clean. He built one playground in all of Harlem, claiming land there was too expensive, yet built many playgrounds in neighborhoods where land was more expensive. Moses kept one pool near a black ghetto unheated, hoping this would drive African-Americans away, while heating other pools throughout the city. In 1943, a grand jury concluded that lack of recreational facilities, compared to other areas of the city, contributed to a Brooklyn ghetto's high crime rate, but the grand jury was powerless to order a rebalancing of city services. Robert Caro, *The Power Broker* (1975).

As recently as 2008, a federal jury awarded $11 million in damages to residents of an unincorporated African-American neighborhood on the Zanesville, Ohio border, where black plaintiffs were denied water service for 50 years. James Dao, *Ohio Town's Water at Last Runs Past a Color Line*, N.Y. Times, Feb. 17, 2004. As late as the 1980s, a water authority official asserted "those niggers will never have running water." Blacks' cost of water (e.g., from purchased bottled water) was ten times the cost for white homeowners who obtained municipal water. *Kennedy v.*

City of Zanesville, 505 F. Supp. 2d 456 (S.D. Ohio 2007).

C. Government-enforced Dual Labor Market

Unaffordable suburban residence for many African-Americans today partly results from federally sustained (and partly created) dual labor markets during the twentieth century. The Fair Labor Standards Act, Social Security Act, and National Labor Relations Act excluded agricultural or domestic service workers, where African-Americans were present in large numbers. Congressional debates show that racial motivation of the legislative exclusions was explicit. *See* Katznelson, *supra*.

During World War II, hundreds of thousands of African-Americans migrated to urban areas to work in defense industries where they were often barred from all but the lowest-skilled jobs. Unions representing workers at defense plants controlled hiring and promotions, and frequently barred African-Americans from membership. Although a 1941 presidential order prohibited discrimination by defense contractors and unions, many covered employers and unions ignored the order.

The National Labor Relations Board (NLRB) certifies unions for exclusive bargaining rights. In no cases during the war, when white workers were climbing the economic ladder in industrial and craft unions, did the NLRB refuse to certify unions that

maintained explicit policies of racial exclusion. *See* Thurgood Marshall, *Negro Status in the Boilermakers Union*, The Crisis (March 1944); Herbert R. Northrup, *Organized Labor and Negro Workers*, 51 J. Pol. Econ. 206 (1943).

The federal government recognized and bargained with segregated unions representing its own workforce. For example, the National Association of Letter Carriers, the exclusive bargaining agent for mail delivery workers, did not permit African-American letter carriers to join, in some areas into the 1970s. Black letter carriers could not, therefore, file grievances through their union. It was not until 1962 that President Kennedy issued an executive order prohibiting racial discrimination by unions representing federal employees. As in the case of the Letter Carriers, such discrimination continued at least for another decade. Nat'l Assoc. of Letter Carriers, AFL-CIO, *Same Work, Different Unions*, Postal Record, June 2011, at 8.

In 1964 the NLRB for the first time denied certification to a private sector union because it practiced racial discrimination. *Indep. Metal Workers, Locals 1 & 2 (Hughes Tool Co.)*, 147 NLRB 1573 (1964). It was another decade before African-Americans were admitted without discrimination to many craft unions, but seniority meant it would be many years until African-Americans rose in rank to the point where their incomes were comparable to whites'. By then, racial income inequality was firmly established. As the nation deindustrialized, the

benefits for African-Americans of non-discrimination in the labor market were much less than they would have been a half-century earlier, severely limiting African-Americans' opportunities to accumulate wealth for home ownership.

II. DISPARATE IMPACT CLAIMS ARE NECESSARY TO DISINTERMEDIATE PATTERNS OF RESIDENTIAL SEGREGATION FOSTERED BY FEDERAL, STATE, AND LOCAL POLICIES.

A. Metropolitan Regions Remain Deeply Segregated by Race

As a consequence of federal, state, and local policies and private discrimination, racial residential segregation remains pervasive more than four decades after the passage of the Fair Housing Act, and in many cases has intensified and deepened. Accompanying these trends are correlate patterns of racial concentration and isolation that remain stubbornly persistent across our nation's metropolitan neighborhoods.

According to 2006-2009 Census estimates, 75% of African-American families reside in just 16% of census tracts. Another measure of this hyper segregation is the fact that 30% of African-Americans live in Census Block Groups that are 75% African-American or more. Craig Gurian, *Mapping and Analysis of New Data Documents Still-Segregated America*, Remapping Debate (Jan. 18, 2011),

available at http://www.remappingdebate.org/map-data-tool/mapping-and-analysis-new-data-documents-still-segregated-america. The growth of Asian and Hispanic populations in recent decades masks the historically structured patterns of racial residential segregation that persist in our metropolitan regions. These populations often moved into neighborhoods that were previously all black, but this has done little to integrate African-Americans into white neighborhoods.

The best measure of racial segregation describes the "exposure" of African-Americans to the majority white population. By this measure, segregation is greater today than in 1940 when the average African-American lived in a neighborhood that was 40% white. In 1950, exposure fell to 35% – where it remains in the 2010 Census. Segregation may recently have increased further because of the subprime/foreclosure epidemic, which disproportionately affected African-Americans, many of whom moved to inner-ring suburbs with white neighbors during the housing boom.

The Census includes Mt. Holly in the Philadelphia-Camden-Wilmington Metropolitan Statistical Area. This is the area in which displaced Mt. Holly residents are most likely to find new housing that is proximate to their employment and families. Considering the New Jersey portion of Burlington, Camden, and Gloucester Counties, African-American exposure to whites fell from 52% to 45% from 1980 to 2010. African-Americans in the Mt. Holly region, therefore, are less likely to have white neighbors now than 30 years ago. *Segregation: Three Measures*, Camden Metropolitan Division, US2010.

When a low-income neighborhood like Mt. Holly's is slated for demolition and redevelopment, black residents are likely, even with relocation assistance, to find new housing primarily in neighborhoods that are as, if not more segregated by race and class. The historic patterns of exclusion from white neighborhoods, now unaffordable to displaced African-Americans, leave these displaced families with few options, unless specific provision in the redevelopment plan is made for their resettlement in integrated neighborhoods.

B. Because of the Enduring Effects of Federal, State, and Local Policies and Actions that Segregated Metropolitan Areas, Subsequent Public Policies and Private Actions Perpetuate These Residential Patterns and Frequently Exacerbate Them

Publicly enforced dual labor markets, along with public policies to create urban ghettos and white suburbs, share responsibility for the segregation that structures African-Americans' geographic mobility in metropolitan areas. By the Fair Housing Act's 1968 adoption, racially discriminatory public policy and private discrimination had produced entrenched patterns of residential segregation and resource disparities that continue despite subsequent anti-discrimination statutes, Court decisions, and strengthened fair housing legislation and regulations.

Housing values in predominantly white areas have now appreciated to the point that most African-Americans, barred from participating in the boom that created these values, can no longer voluntarily integrate most suburban communities. Vacant land is no longer plentiful in predominantly white suburbs, and where land is available, suburbs typically lock-in racial exclusivity with facially-neutral zoning ordinances that forbid construction of affordable housing. Requiring larger lot development and low-density zoning depresses growth of rental housing, increases housing costs, and limits the influx of African-American and Latino households. Rolf Pendall, *Local Land Use Regulations and the Chain of Exclusion*, 66 J. Am. Plan. Assoc. 125-42 (2000). Fragmented local governments and school districts in metropolitan areas enable municipalities to enact parochial policies that perpetuate residential segregation.

Such exclusionary zoning practices are not only common, but are indirectly subsidized by HUD's continued provision of block grants to jurisdictions where racial homogeneity persists and exclusionary practices remain in place. HUD is now formulating a rule to condition grants on policies to affirmatively further fair housing, but that such a rule is now being considered 45 years after the Fair Housing Act required it, is itself suggestive of how racial segregation has been permitted to rigidify. Federal and state subsidized housing also contributes to perpetuation of racial segregation, because subsidized housing is

clustered in inner-city minority communities. As of 2000, three-quarters of the nation's assisted housing units, and 58% of its Low Income Housing Tax Credit units, were located in central cities, home to only 37% of the nation's metropolitan population. Lance Freeman, *Siting Affordable Housing*, Brookings Institution (2004). In metropolitan areas, most of the remainder are sited in newly segregated first-ring suburbs where minority populations have concentrated as inner cities gentrify.

In 1961, the U.S. Commission on Civil Rights concluded that as a result of an inseparable pattern of public and private policy, "[r]esidential segregation is so deeply ingrained in American life that the job of assuring equal housing opportunity to minority groups means not only eliminating present discriminatory practices but correcting the mistakes of the past as well." USCCR *Book 4*, at 3-5. Since that time, insufficient public action has occurred to correct the mistakes of the past and in consequence, those mistakes continue to limit contemporary policies that, superficially, seem to be race-neutral.

Petitioners and their *amici* argue that disparate impact claims lead to undesirable results by holding a government actor liable for "innocent" private housing decisions or "legitimate" government action. As Petitioners explained, "disparate impact claims brought in the housing context are not the functional equivalent to intentional discrimination." *Mt. Holly Gardens Citizens in Action v. Twp. Mount Holly*, 658 F.3d 375 (3d Cir. 2011). That is precisely the point.

The Fair Housing Act targeted practices that were neutral on their face but nonetheless froze the harmful effects of prior racial discrimination. The segregative effects of new, facially race-neutral policies in the context of patterns fostered by historical policies described in this brief have been profound.

The forms of "legitimate government action" or "innocent" private decisions cited by the Petitioners and their *amici* perpetuates and exacerbates extant conditions absent invidious intent of municipal or private actors. As Petitioners concede, the FHA was designed to address the "perpetuation" of segregation, not merely its creation. *Id.*

Disparate impact claims require governmental entities to account for residential patterns brought into existence through historical public policies intertwined with private discrimination. These entities must ensure they neither perpetuate nor exacerbate them inadvertently. In *Croson*, this Court was careful to note that local governments have authority to remedy private discrimination if they have become a "passive participant" in a system of racial exclusion. *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989). The converse is also true. Where segregative patterns are erected on structures that flow from past intentional discrimination, they should not be permitted to continue, regardless of intent. Limiting FHA claims to a showing of intentional discrimination would permit the perpetuation and exacerbation of these patterns in violation of the clear meaning and intent of the FHA.

The FHA targeted not only individual housing discrimination but also charged the government with "affirmatively furthering" fair housing to redress the long history of past discriminatory practices. Disparate impact claims are necessary to fulfill the purposes and function of the Fair Housing Act, and are essential to redress and disestablish entrenched patterns of residential segregation. For these reasons, we ask this Court to affirm the decision of the Third Circuit Court of Appeals in this case.

CONCLUSION

On the basis of the foregoing arguments and authorities, the Housing Scholars urge this Court to affirm the decisions of the lower courts.

Respectfully submitted,

Dated: October 28, 2013

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